

## Louisiana Law Review

---

Volume 33 | Number 4

*ABA Minimum Standards for Criminal Justice - A*

*Student Symposium*

*Summer 1973*

---

# Concurrent Right to Surface Use in Conjunction with Oil and Gas Development in Louisiana

Robert J. Prejeant

---

### Repository Citation

Robert J. Prejeant, *Concurrent Right to Surface Use in Conjunction with Oil and Gas Development in Louisiana*, 33 La. L. Rev. (1973)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol33/iss4/14>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## CONCURRENT RIGHT TO SURFACE USE IN CONJUNCTION WITH OIL AND GAS DEVELOPMENT IN LOUISIANA

The proper development of a given tract of land for oil and gas exploration and exploitation generally requires the use of a considerable amount of land; however, not all of a tract is usually needed. Thus, the land will be suitable for more purposes than oil exploration. As land values increase, the right to use this land concurrently with oil and gas activities becomes more valuable.

Concurrent use rights to a tract of land may originate in several manners. The most common situation is that in which the landowner grants only a mineral lease, retaining his surface rights. Many times, however, the landowner leases both the surface and mineral rights concurrently. Also there is the possibility of a mineral servitude owner, his assignee, or lessee, conducting oil and gas operations.

The purpose of this Comment is to survey the solutions reached by courts of other jurisdictions and to examine Louisiana jurisprudence arising out of controversies involving concurrent surface rights. A useful approach in preliminary analysis of the merits of such controversies might be taken by first considering whether the activity in question constitutes an activity authorized by the nature of the right a party claims. If the activity is authorized, it should next be determined whether the activity was performed in a proper manner. It is not suggested that this twofold approach be taken as a standard *per se*, merely that it would be useful as an analytical tool.

### *Other Jurisdictions*

In other jurisdictions, no precise distinction seems to be made between the standard applicable to the mineral lessor-

---

is a relevant fact . . . ." LA. R.S. 9:396 (Supp. 1972). It has been suggested that the model act has applicability in the following areas: 1. disavowal action; 2. divorce where ground is adultery; 3. mother seeking custody of children; 4. when another claims paternity; 5. dispute over child's claim to an estate; 6. to prove non-citizenship of a child; 7. rape and bastardy cases. Gold, 1962-63 *Survey of Pennsylvania Law—Domestic Relations*, 25 U. Prrt. L. Rev. 341, 347 (1963). Although this Comment concerned institution of the suit by a husband to overcome the presumption of legitimacy, it does not seem the act is restricted as to what party may bring the action. This could have far reaching effects in Louisiana since the courts have held that only the husband may institute the action *en desaveu*. Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892).

lessee and the mineral estate owner-landowner relationship.<sup>1</sup> Generally, the mineral operator is allowed to use the land to the extent reasonably necessary to extract the minerals, employing the customary and accepted practices of the industry. Also, each party must use the surface with due regard for the rights of the other.<sup>2</sup>

Many cases have arisen concerning the extent to which the mineral operator may use the surface. The mineral operator may use only that portion of the surface reasonably necessary.<sup>3</sup> Thus, if it is found that the operator's use is reasonably necessary, he will not be liable for destruction of timber and growing crops.<sup>4</sup> He is free to use the land for a wide variety of activities accessory to his actual extraction of minerals.<sup>5</sup> His use of the

---

1. See generally H. WILLIAMS & C. MEYERS, OIL & GAS LAW §§ 218-7, 218-8 (1971).

2. *E.g.*, Union Prod. Co. v. Pittman, 245 Miss. 427, 433, 146 So.2d 553, 555 (1962): "[R]ights of owners of minerals are limited to so much of the surface and such use thereof as is reasonably necessary to properly mine and carry away the minerals. These rights are also subject to the limitations that the mineral owner does not use the surface in such a way as unnecessarily to destroy or injure it. The right to remove minerals by the usual or customary method of mining exists, even though the surface of the ground may be wholly destroyed as a result thereof. The owner of the surface and the owner of the minerals should have due regard for each other and should exercise that degree of care and use which is a just consideration for rights of the other. The owner of the surface of the land has the right to enjoy the land free from annoyance, except such as reasonably arises from the opening, exploitation, mining, and marketing of the minerals. The mineral owner on the other hand is not limited by the fact that his acts may cause inconvenience to the surface owner." See also Lone Star Prod. Co. v. Jury, 445 P.2d 284 (Okla. 1968); Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex. Civ. App. 1958); Miller v. Crown Cent. Petr. Co., 309 S.W.2d 876 (Tex. Civ. App. 1958).

As to burden of proof, acts by the mineral operator are seldom considered negligence per se. *Peters Petr. Co. v. Alred*, 156 Okla. 249, 10 P.2d 705 (1932). In order to recover, the surface owner must prove both the extent of injury and that the injury was due to negligent operations, in disregard of his concurrent use rights. *Pure Oil Co. v. Gear*, 183 Okla. 489, 83 P.2d 389 (1938).

3. *Union Prod. Co. v. Pittman*, 245 Miss. 427, 435, 146 So.2d 553, 556 (1962).

4. *Gulf Oil Ref. Co. v. Davis*, 224 Miss. 464, 80 So.2d 467 (1955).

5. *Gulf Oil Ref. Co. v. Davis*, 224 Miss. 464, 80 So.2d 467 (1955) (construction of pits for the storage of salt water); *Pure Oil Co. v. Gear*, 183 Okla. 489, 83 P.2d 389 (1938) (construction of ditches for removal of salt water); *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex. Civ. App. 1958) (construction of new access roads); *Joyner v. R.H. Dearing & Sons*, 134 S.W.2d 757, 759 (Tex. Civ. App. 1939) (construction of quarters for a watchman when deemed reasonably necessary to protect the operations "is a question of fact whether, in connection with the production of oil, the saving and marketing thereof, this is not reasonably necessary and incidental").

A recurring problem involves the use of water in connection with mineral operations. Surface water may be used for mineral activities,

surface in conjunction with unit operations on neighboring lands has been held proper in several instances.<sup>6</sup> The lessee may also select the site for his operations, subject only to the requirements of reasonable necessity and reasonable regard for other concurrent users.<sup>7</sup>

Once it is established that the mineral operator may perform the activity in question, the courts will usually next determine whether the operation was performed in a proper manner. Negligence in conducting operations otherwise deemed necessary may result in liability.<sup>8</sup>

---

*Russell v. Texas Co.*, 238 F.2d 636 (9th Cir. 1956), but only for the development of minerals beneath the premises, *Stradley v. Magnolia Petr. Co.*, 155 S.W.2d 649 (Tex. Civ. App. 1941), and then only to the extent reasonably necessary, *Gray v. Ellis*, 257 F.2d 159 (5th Cir. 1958). The mineral operator may construct a pond where found reasonably necessary, *Wardell v. Watson*, 93 Mo. 107, 5 S.W. 605 (1887), and may ordinarily drill a water well, *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D. Mont. 1968). But see *Arkansas-La. Gas Co. v. Wood*, 240 Ark. 948, 403 S.W.2d 54 (1966) (defendant mineral lessee was deemed unauthorized to extract water from lessor's artificial stock pond). This case is distinguishable, however, in that by completely draining lessor's artificial stock pond, which was filled by lessor's own wells, the mineral lessee both engaged in an excessive use of surface water, and breached specific lease provisions. The Arkansas supreme court did not refute the proposition that the mineral lessee is entitled to necessary and reasonable use of surface water.

6. *Holt v. Southwest Antioch Sand Unit, Fifth Enlarged*, 292 P.2d 998 (Okla. 1955) (a well which is no longer producing may still be operated for extraction of salt water used in secondary recovery on adjoining premises, when both premises are unitized and the secondary recovery results in increased unit production); *Miller v. Crown Cent. Petr. Co.*, 309 S.W.2d 876 (Tex. Civ. App. 1958) (pipelines carrying salt water across the surface for use on adjoining unitized premises are permitted).

7. *E.g.*, *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 263-64 (Tex. Civ. App. 1958): "[T]he holder of the mineral estate has the right to put his wells where he wants to, and that does not mean that he shall be forced to use or try to utilize abandoned wells, or that he must drill so close to such abandoned wells that he can utilize all or part of the former drill site." See also *Lone Star Prod. Co. v. Jury*, 445 P.2d 284 (Okla. 1968); *Davon Oil Co. v. Steele*, 186 Okla. 380, 98 P.2d 618 (1940); *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853 (Tex. Civ. App. 1970); *Shell Petr. Corp. v. Liberty Gravel & Sand Co.*, 128 S.W.2d 471 (Tex. Civ. App. 1939); *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. Civ. App. 1919). A well site may not be selected, however, if it would unduly threaten the property and lives of surface owners, especially where other well sites are available. *Gulf Pipe Line Co. v. Pawnee-Tulsa Petr. Co.*, 34 Okla. 775, 127 P. 252 (1912).

8. *E.g.*, where the mineral operator has constructed facilities for the storage and removal of salt water, he need not normally erect fences to keep the landowner's cattle out, *Pure Oil Co. v. Gear*, 183 Okla. 489, 83 P.2d 389 (1938), but may be held liable for failure to take reasonable precautions after discovering that the surface owner's cattle have been wandering into unprotected salt water pits, *Peters Petr. Co. v. Alfred*, 156 Okla. 249, 10 P.2d 705 (1932), or for constructing such pits while charged with knowledge of the presence of cattle and having failed to give adequate notice of the proposed undertaking, *Texas Co. v. Mosshamer*, 175 Okla. 202, 51 P.2d 757 (1935). Liability for the destruction of trees or cattle occasioned by the

In other jurisdictions, then, the standard of reasonable necessity governs whether a particular surface use is authorized, but reasonable care is required in conducting such operations. This is the language of negligence. Courts elsewhere have not, however, carefully divided their inquiries by asking first whether the activity is authorized and second whether, if authorized, proper care has been observed.<sup>9</sup> Such an approach might well lead to an easier analytical process and better reasoned opinions in these cases.

### *Louisiana Mineral Lessors and Lessees*

Although Louisiana courts have long held that mineral leases are to be administered in accordance with the Civil Code provisions governing leases generally,<sup>10</sup> they have paid little attention to the articles which might be utilized to resolve disputes concerning surface use. From these Civil Code provisions several general propositions may be listed. The lessor is bound to deliver the premises, maintain it in a suitable condition for the purpose leased, and afford the lessee peaceable possession.<sup>11</sup> The lessor may make no alteration during the term of the lease.<sup>12</sup> On the other hand, the lessee is bound to use the leased premises as a good administrator, and only for the use intended.<sup>13</sup> At the termination of the lease, the lessee, is bound to return the leased item in the same state in which it was delivered to him, with allowance for wear and tear and unavoidable accidents.<sup>14</sup> The

---

construction of such pits in a negligent manner may also result. *Gulf Oil Ref. Co. v. Davis*, 224 Miss. 464, 80 So.2d 467 (1955); *Pine v. Robson*, 187 Okla. 679, 105 P.2d 530 (1940). See also *Warren Petr. Corp. v. Helms*, 207 Okla. 699, 252 P.2d 447 (1952); *Magnolia Petr. Co. v. Howard*, 182 Okla. 101, 77 P.2d 18 (1938); *Phillips Petr. Co. v. Bartmess*, 181 Okla. 501, 76 P.2d 352 (1937); *Texas Co. v. Taylor*, 178 Okla. 21, 61 P.2d 574 (1936).

9. Factors that may be of importance in reaching such a determination might include the value of the surface use, whether there are alternative sites or methods available, and the relative costs and benefits of these alternatives to the parties involved. It is equally possible that the party entitled to use of the surface may also conduct activities either unauthorized or improper in light of the mineral operator's rights. In such an event, the same approach could be utilized.

10. *Melancon v. Texas Co.*, 230 La. 593, 89 So.2d 135 (1956); *Milling v. Collector of Revenue*, 220 La. 773, 57 So.2d 679 (1952); *Tyson v. Surf. Oil Co.*, 195 La. 248, 196 So. 336 (1940).

11. La. Civ. Code art. 2692.

12. *Id.* art. 2698.

13. *Id.* art. 2710. If this latter tenet is violated, the lessor is entitled to dissolution of the lease and damages occasioned by such misuse. *Id.* art. 2711.

14. *Id.* arts. 2719-20.

lessee is liable only for injuries and losses occasioned through his own fault,<sup>15</sup> but remains liable for waste caused by his sub-lessee.<sup>16</sup> The neglect of either party to fulfill his engagements may cause a dissolution of the lease, except that the judge shall not order any delay in the dissolution.<sup>17</sup>

It would appear that these Code articles are directly on point in mineral lease cases involving rights to surface use, but reliance upon them alone would be unwise. It has been recognized that the mineral lessor-lessee relationship is one of a special nature, because the mineral lease is not a normal lease as envisioned by the redactors of the Civil Code.<sup>18</sup> The approach and standards used in Louisiana decisions thus strongly resemble those of other jurisdictions, using the language of ordinary negligence and not dividing the inquiries involved as suggested above.

The Louisiana cases also yield the same principles as those in other jurisdictions. A mineral lessee may extend his operations only to the extent reasonably necessary to effectively produce the minerals under the terms of the lease contract, and should maintain and restore the premises in its original condition, subject to his rightful use.<sup>19</sup> He must exercise his rights with reasonable regard for concurrent users and has a reciprocal right to similar consideration.<sup>20</sup> The lessee must prove actual injury and the extent of such injury.<sup>21</sup> Express provisions of the lease regarding surface use are honored,<sup>22</sup> and the provisions of the Civil Code concerning conventional obligations are applicable.<sup>23</sup>

---

15. *Id.* art. 2721.

16. *Id.* art. 2722.

17. *Id.* art. 2729. This delay provision has been found inapplicable in mineral lease cases. *Rudnick v. Union Prod. Co.*, 209 La. 943, 25 So.2d 906 (1946); *Edwards v. Standard Oil Co.*, 175 La. 720, 144 So. 430 (1932); *Brewer v. Forest Gravel Co.*, 172 La. 828, 135 So. 372 (1931).

18. *Wemple v. Pasadena Petr. Co.*, 147 La. 532, 85 So. 230 (1920).

19. *Smith v. Schuster*, 66 So.2d 430 (La. App. 2d Cir. 1953).

20. *Pennington v. Colonial Pipeline Co.*, 260 F. Supp. 643 (E.D. La. 1966), *aff'd*, 387 F.2d 903, *modified on other grounds*, 400 F.2d 122 (5th Cir. 1968).

21. *Bean v. Tennessee Trans. Co.*, 136 So.2d 315 (La. App. 2d Cir. 1961); *Lelong v. Richardson*, 126 So.2d 819 (La. App. 2d Cir. 1961).

22. *E.g.*, *Rohner v. Austral Oil Exploration Co.*, 104 So.2d 253 (La. App. 1st Cir. 1958) (contract providing for all damages caused to timber and growing crops).

23. *Roy O. Martin Lmbr. Co. v. Pan American Petr. Corp.*, 177 So.2d 153 (La. App. 3d Cir. 1965). The lease clause provided that the lessee was to be responsible for all damages to land, crops, timber, and improvements due to its operations. Upon determination that timber had been destroyed, damages for only the timber merchantable at that time were allowed:

Applying these principles, the lessee may cut timber<sup>24</sup> or clear farmland<sup>25</sup> in order to establish a well site. The construction of overflow pits,<sup>26</sup> removal of fences,<sup>27</sup> and conduct of seismic operations<sup>28</sup> are considered proper conduct by a mineral lessee. No Louisiana cases have been found in which a mineral lessee involved in litigation with his mineral lessor was found to have been engaged in a clearly unauthorized activity.<sup>29</sup> As to the manner of performance, the lessee in clearing well sites must minimize destruction of timber and cut no more

---

the damage to timber not yet merchantable was not allowed since it was found too speculative and not within the contemplation of the parties as governed by Civil Code article 1934. *See also* LA. CIV. CODE arts. 2668, 2710, 2721.

24. *Wemple v. Pasadena Petr. Co.*, 147 La. 532, 85 So. 230 (1920).

25. *Rohner v. Austral Oil Exploration Co.*, 104 So.2d 253 (La. App. 1st Cir. 1958).

26. *Rohner v. Austral Oil Exploration Co.*, 104 So.2d 253 (La. App. 1st Cir. 1958); *Smith v. Schuster*, 66 So.2d 430 (La. App. 2d Cir. 1953).

27. *Rohner v. Austral Oil Exploration Co.*, 104 So.2d 253 (La. App. 1st Cir. 1958).

28. *Pennington v. Colonial Pipeline Co.*, 260 F. Supp. 643 (E.D. La. 1966), *aff'd*, 387 F.2d 903, *modified on other grounds*, 400 F.2d 122 (5th Cir. 1968). In *Pennington*, there was no question of damages caused by blasting. Louisiana courts have dealt with several cases in which damages to foundations, water wells, and levees caused by geophysical explosions were compensated. The most notable of these decisions is *Fontenot v. Magnolia Petr. Co.*, 227 La. 866, 80 So.2d 845 (1955), in which recovery seemed to be predicated upon Civil Code article 667, but where the court also spoke of "the doctrine of absolute liability." A similar result is found in *Pate v. Western Geophysical Co. of America*, 91 So.2d 431 (La. App. 2d Cir. 1956), but is based upon a finding that the mineral operator was absolutely liable for the consequences of blasting. In *Langlinals v. Geophysical Serv. Inc.*, 237 La. 585, 111 So.2d 781 (1959), plaintiff agricultural lessee was awarded damages against defendant, an agent of the tract's mineral lessee conducting seismic operations, based upon the tort doctrine of *res ipsa loquitur*. The court there avoided consideration of article 667 and the doctrine of absolute liability as announced in *Fontenot*. *See also*, *Gulf Ins. Co. v. Employees Liab. Assur. Corp.*, 170 So.2d 125 (La. App. 4th Cir. 1964).

If the theory of absolute liability should be rejected in favor of a theory of liability based upon article 667, a strict application of that article would be of no benefit to those with concurrent rights to the use of a particular surface area, as the article speaks only of adjoining landowners. It may be questionable from a policy standpoint to draw such a distinction since there is no apparent reason for distinguishing a landowner or a surface lessee from a neighboring landowner. While it may be argued that the parties were cognizant of the right of the mineral operator to conduct such seismic activities, disastrous or extraordinary consequences certainly should not be held to have been within their contemplation.

29. In *East v. Pan American Petr. Corp.*, 168 So.2d 426 (La. App. 3d Cir. 1964), the court found that lessee's action in excavating lessor's marshland for the construction of a board road to a well site on adjacent land was neither necessary nor reasonable. The court based its finding, however, upon the terms of the lease contract and the intent of the parties.

fences than is reasonably necessary.<sup>30</sup> Further, the lessee is under no obligation to protect lessor's fences from the activities of operators on adjacent premises.<sup>31</sup> The lessee is obligated, upon completion of operations, to restore the premises to its former condition.<sup>32</sup> Seismic operations may not be conducted in such a manner as to deprive the landowner entirely of his right to use the surface, particularly where alternative sites or methods are available.<sup>33</sup> Damages are apparently limited to physical damage as it has been held that a lessee is not liable for damages due to mental anguish caused by noises normally incident to drilling operations.<sup>34</sup>

The correlative rights of lessor and lessee concerning surface use were confirmed in *Pennington v. Colonial Pipeline Co.*<sup>35</sup> Unlike most lessor-lessee disputes, this arose out of a demand by the lessee that the landowner cease certain activities which, lessee asserted, interfered with its right to conduct seismic activities. The lessee sought to have Colonial shut down all pipeline operations so as not to interfere with its seismic testing, demanding drainage of all lines and storage tanks which might be in the way. The court reasoned that to grant plaintiff the relief sought would constitute an undue interference with Colonial's right to reasonable use of the property. It was decided that by altering the exploration plan, plaintiff could efficiently exercise his right and at the same time allow Colonial to continue its operations. The decision is commendable in that it recognizes the right of each party to concurrently carry on authorized activity in a reasonable and proper manner.

It appears that an initial determination of whether the activity in question was an authorized one, and if so, whether it was conducted in a reasonable and proper manner could prove

---

30. *Wemple v. Pasadena Petr. Co.*, 147 La. 532, 85 So. 230 (1920). It was found in this case that the mineral lessor simply failed to show that lessee cut an unreasonable amount of timber.

31. *Id.*

32. *Smith v. Schuster*, 66 So.2d 430 (La. App. 2d Cir. 1953). This case involved restoration of land cleared for a well site and upon which pits had been constructed.

33. *Pennington v. Colonial Pipeline Co.*, 260 F. Supp. 643 (E.D. La. 1966), *aff'd*, 387 F.2d 903, *modified on other grounds*, 400 F.2d 122 (5th Cir. 1968).

34. *Rohner v. Austral Oil Exploration Co.*, 104 So.2d 253 (La. App. 1st Cir. 1958).

35. 260 F. Supp. 643 (E.D. La. 1966), *aff'd*, 387 F.2d 903, *modified on other grounds*, 400 F.2d 122 (5th Cir. 1968).



helpful in analyzing situations such as in *Pennington*.<sup>36</sup> More reliance might also be placed upon pertinent provisions of the Civil Code.

### *Surface Lessee and Mineral Lessee*

Upon first impression, the problems as to right to surface use between a surface lessee and a mineral lessee would not appear substantial. It would seem that the surface lessee should be entitled to exercise the same rights to surface use as his lessor, unless the lease granted him some inferior right. In Louisiana cases of this nature, however, it has been said that each must conduct his operations with due regard for the rights of the other,<sup>37</sup> employing reasoning similar to that used by both

---

36. Two hypothetical situations may illustrate the value of these suggestions. Assume a mineral lessee has ten wells on lessor's land, five of which are still productive. Is the mineral lessee obligated to restore the surface area after cessation of operations in each particular area, or must he only return the leased premises in good condition after the termination of the lease itself? It is evident that the lessee, in occupying surface area no longer needed for the proper conduct of mineral operations, is now engaged in unauthorized activity, and should be compelled to remove the non-productive wells. The code provisions on lease provide authority for arrival at such a conclusion. The lessee, according to Civil Code article 2710, must "enjoy the thing leased as a good administrator, according to the use for which it was intended by the lease." Occupation of surface area by structures which no longer contribute to the conduct of mineral activities cannot be considered the action of a good administrator, according to the use intended by the lease. Civil Code article 2711 provides that the lessee must not make another use of the thing than that for which it was intended. The lessee, by occupying surface area without in any manner facilitating mineral development, has then engaged in unauthorized activity and has specifically violated code provisions.

Another conceivable situation is one in which the mineral lessor may wish to put the property to a use which may make mineral exploration and development difficult or impossible (e.g., a lessor who begins construction of a shopping center and parking lot which would cover most or all of the leased premises). It is obvious that the lessor would be utilizing his right to surface use in a completely unreasonable manner, without regard to the concurrent rights of his mineral lessee. Civil Code article 2692 requires the lessor to "maintain the thing in a condition such as to serve for the use for which it is hired." Civil Code article 2698 provides a lessor may not "make any alteration in the thing during the continuance of the lease." These articles could provide a basis for compelling the lessor to refrain from activities which would deny his lessee the right to engage in the proper conduct of mineral operating.

37. *E.g.*, *Lauzon v. J.C. Trahan Drilling Contr., Inc.*, 247 So.2d 236 (La. App. 4th Cir.), *writs refused*, 259 La. 69, 249 So.2d 206 (1971). The mineral lessee "cannot conduct his operations in disregard of the rights of the oyster lessee." 247 So.2d at 240.

Louisiana courts and courts of other jurisdictions in dealing with the lessor-lessee relationship.<sup>38</sup>

The results of Louisiana decisions illustrate these principles. The surface lessee is not authorized to engage in activity which is clearly within the authority of the mineral lessee.<sup>39</sup> However, in spite of past misconduct by the surface lessee, the mineral lessee is not entitled to enjoin him from re-entering the leased premises for reasonable exercise of his own rights.<sup>40</sup>

A mineral lessee of state-owned waterbottoms is liable for pollution damages which an oyster lessee can prove were the proximate cause of such injuries.<sup>41</sup> The mineral lessee is entitled to dredge channels through oyster beds when it is found reasonably necessary for its mineral operations.<sup>42</sup> As long as the dredging is conducted in a reasonable manner and is necessary, no damages will be assessed.<sup>43</sup> If the mineral lessee knowingly dredges a channel through an oyster bed when he is aware of an alternate site which would minimize damages, he will be responsible for the loss occasioned thereby.<sup>44</sup> The mineral lessee will not be liable for oyster bed damages arising from seismic

---

38. See *Collins v. Morrow*, 234 So.2d 234 (La. App. 2d Cir. 1970), where the surface lessee was held entitled to damages for the loss of a cow due to mineral lessee's *negligent* action in allowing seepage of salt water and oil wastes.

39. *Standard Oil Co. v. Kinnebrew*, 155 La. 1009, 99 So. 802 (1924). Here the surface lessee was given all rights to the use of the surface, including the right to reclaim waste oil. The court enjoined the surface lessee from measures aimed at taking waste oil that the mineral lessee had himself salvaged by development of new operating techniques.

40. *Id.*

41. *Doucet v. Texas Co.*, 205 La. 312, 17 So.2d 340 (1944). The burden of proof is upon the party alleging the damage. Compare *Trosclair v. Superior Oil Co.*, 219 So.2d 278 (La. App. 1st Cir. 1969) (oyster lessee failed to meet the burden of proof), with *Skansi v. Humble Oil & Ref. Co.*, 176 So.2d 236 (La. App. 4th Cir. 1965) (burden of proof was met and damages allowed). The court in *Trosclair* suggested a very high burden of proof upon the oyster lessee, because it took the oyster lease subject to the outstanding mineral lease and was aware of the risk.

42. *Collins v. Texas Co.*, 267 F.2d 257 (5th Cir. 1959); *Vodopija v. Gulf Ref. Co.*, 198 F.2d 344 (5th Cir. 1952); *Begovich, Gonzales, & Plaisance v. Texas Co.*, 209 F. Supp. 412 (E.D. La. 1962). See also *Vodopija v. Tennessee Gas Trans. Co.*, 152 F. Supp. 14 (E.D. La. 1957).

43. *E.g.*, *Vodopija v. Gulf Ref. Co.*, 152 F. Supp. 14, 17 (E.D. La. 1957): "Each industry has a right to operate side by side under its permits or leases and as long as it operates reasonably and with due regard for the rights of others, any damage to those rights is *damnum absque injuria*."

44. *Lauzon v. J.C. Trahan Drilling Contr., Inc.*, 247 So.2d 236 (La. App. 4th Cir.), *writs refused*, 259 La. 69, 249 So.2d 206 (1971).

operations, provided they are not conducted in a negligent manner.<sup>45</sup>

*Trosclair v. Superior Oil Company*<sup>46</sup> raises a question as to the impact of order of recordation on the mineral lessee's duty towards concurrent users. *Trosclair* involved suit by an oyster lessee against a mineral lessee who had recorded his lease prior to the beginning of plaintiff's lease. Plaintiff alleged that defendant allowed the escape of wastes which subsequently damaged plaintiff's oysters. The court found that defendant did indeed discharge wastes, but that plaintiff had failed to prove that this discharge was the cause of the oyster damage. Although there seemed to be proper justification for such a conclusion, some of the opinion language, if read literally and out of context with the above mentioned cases, could be misconstrued. The court stated that, even if plaintiff had met his burden of proof, the defendant's prior recordation would subordinate the oyster lease to the mineral lease.<sup>47</sup>

It is questionable whether the concept of registry should be used to enable one who has a previously recorded lease to engage in activity which he could not perform had the landowner not leased the property. In *Trosclair*, it cannot seriously be contended that if the state itself had been engaged in oyster fishing on its lands rather than leasing for that purpose, it could not recover for mineral lessee's discharge of pollutants into the water. This action constitutes clearly improper and unreasonable conduct of mineral operations. Should the oyster lessee, who purportedly has the same rights to the use of the water-

---

45. *Collette v. Marine Exploration Co.*, 213 F. Supp. 609 (E.D. La. 1963).

46. 219 So.2d 278 (La. App. 1st Cir. 1969).

47. "[O]ur Courts have consistently held that an oyster bed lease is subject and subordinated to a mineral lease, which was dated and recorded prior to the oyster lease." *Id.* at 281. As authority for this proposition the court cited *Vodopijsa v. Gulf Ref. Co.*, 198 F.2d 344 (5th Cir. 1952), and *Collette v. Marine Exploration Co.*, 213 F. Supp. 609 (E.D. La. 1963). While both of these federal cases dealt with the manner of recordation, it cannot be fairly said that they stand for the proposition that the oyster lease is subject and subordinated to the prior recorded mineral lease. The importance that these two cases placed on recordation was simply that the oyster lessee should have been aware of mineral lessee's authority to conduct authorized mineral exploration and exploitation activities. Both of these cases were decided in favor of the mineral lessee on the basis of the oyster lessee's failure to meet the burden of proof. No inference was based solely upon defendant's prior recordation. Indeed, both cases refer to the necessity for each lessee to conduct his activities with due regard to the rights of the other. "Both parties have a right and an obligation to conduct their respective operations and to so conduct them in a manner that will not negligently cause damage to the other." *Id.* at 611.

bottoms for growing oysters as the state, be denied recovery simply because he has recorded his lease later than the mineral lessee? Should the mineral lessee, who has recorded his lease after the oyster lessee, take his lease subject to the oyster lessee's paramount right and thus not be able in any manner to interfere with the oyster operations? Most land is adaptable to two or more uses. This is a phenomenon that should be encouraged rather than suppressed. A limited purpose lessee should not be entitled to conduct his operations in such a manner as to make activities by other lessees unreasonably difficult or impossible simply by the fact of prior recordation. No violence would be done to the public records doctrine if recordation was viewed in its proper perspective,<sup>48</sup> for the simple reason that surface and mineral lessees of the same land should not be regarded as third parties in relation to each other. Each derives his right from the same person, the landowner. Each is entitled to exercise no more rights than the landowner himself could. Each lessee, when entering the lease agreement, presumably is cognizant of his rights and those of his lessor. The identity of the party who exercises these rights should be of no consequence.

*Andrepoint v. Acadia Drilling Co.*<sup>49</sup> illustrates another ramification of recordation. In this case, plaintiff had entered a verbal lease with the landowner for use of the surface. Defendant had previously recorded its mineral lease. Defendant's construction caused a lack of adequate drainage, damaging plaintiff's crops. The mineral lease contained a clause providing that the lessee would be responsible for all damages caused by its operations. The court found this clause to be a *stipulation pour autrui*; thus, the defendant had privity, registry was of no effect, and plaintiff was awarded damages. Mineral lessees should heed the implications of such a result in future lease provisions dealing with

---

48. Recordation should properly be considered under certain circumstances, as the following example will illustrate. Suppose the mineral lessee records first. Mineral and surface lessee become involved in a dispute over the use of a particular parcel of land. Both parties prove that they would use the parcel for authorized activity, and that they would do so in a reasonable and proper manner. Neither could perform this activity on another part of the leased premises, or relocation would entail great inconvenience and expense. The public records doctrine should, in this case, entitle mineral lessee to conduct such activity. The public records doctrine, then, should be utilized only where compatible uses are impossible or extremely inconvenient.

49. 255 La. 347, 231 So.2d 347 (1969).

damages. Surface lessees and any others who may have derived some right from a landowner should be mindful of the holding of this case as a means of facilitating recovery for damages occasioned by the activities of the mineral lessee.

### *Landowner and Mineral Servitude Owner*

The owner of a mineral servitude<sup>50</sup> is generally recognized in Louisiana as having the right to enter the servient estate, extract the minerals thereunder and reduce them to possession. To exercise these rights, the servitude owner must ordinarily make some use of the surface. Thus, disputes over the manner of exercising this right will inevitably occur.

Louisiana courts have produced little more than general propositions concerning the surface use rights of the mineral servitude owner.<sup>51</sup> The Louisiana supreme court has on one occasion, however, dealt directly with this issue. In *Grayson v. Lyons, Prentiss & McCord*,<sup>52</sup> plaintiff bought land subject to a reservation of the mineral rights. Oil was discovered on the adjoining premises, and plaintiff's tract was subsequently unitized, the defendant being appointed unit operator. The land,

---

50. In *Frost-Johnson Lmbr. Co. v. Sallings Heirs*, 150 La. 756, 91 So. 207 (1922), the Louisiana supreme court recognized that a sale or reservation of mineral rights creates nothing more than a servitude entitling the owner to go onto the servient estate and take possession of the minerals thereunder. Subsequent decisions have applied other code provisions concerning servitudes to mineral transactions. See *Ohio Oil Co. v. Ferguson*, 213 La. 183, 215, 34 So.2d 746, 757 (1947) (concurring opinion of Justice Hamiter).

51. It has often been asserted that the mineral servitude owner has the right to enter and leave the premises for the purpose of extracting minerals and performing all necessary acts in the exercise of this right: "A sale or reservation of the mineral oil or gas in a tract of land constitutes a sale or reservation merely of a real right, or personal servitude, to go upon the land and explore for oil and gas and to possess and own such oil or gas as may be produced. . . ." *Palmer Corp. v. Moore*, 171 La. 774, 779, 132 So. 229, 230 (1930). For similar observations, see *Hodges v. Long-Bell Petr. Co.*, 240 La. 198, 121 So.2d 831 (1959); *Perkins v. Long-Bell Petr. Co.*, 227 La. 1044, 81 So.2d 389 (1955); *Horn v. Skelly Oil Co.*, 224 La. 709, 70 So.2d 657 (1954); *Union Sulphur v. Andrau*, 217 La. 662, 47 So.2d 38 (1950); *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949); *Standard Oil Co. v. Futral*, 204 La. 215, 15 So.2d 65 (1943); *Deas v. Lane*, 202 La. 933, 13 So.2d 270 (1943); *Patton's Heirs v. Moseley*, 186 La. 1088, 173 So. 772 (1937); *Gulf Ref. Co. v. Glassell*, 186 La. 190, 171 So. 846 (1936); *State, Sabine River Auth. v. Salter*, 184 So.2d 783 (La. App. 3d Cir. 1966); *Smith v. Anisman*, 85 So.2d 351 (La. App. 2d Cir. 1956). Federal courts have made similar statements, and have shed no more light upon the problem. See *United States v. Nebo Oil Co.*, 190 F.2d 1003 (5th Cir. 1951); *Frost Lmbr. Indus. v. Republic Prod.*, 112 F.2d 462 (5th Cir. 1940); *Crawford v. Texas Co.*, 99 F. Supp. 766 (W.D. La. 1951).

52. 226 La. 462, 76 So.2d 531 (1954).

previously used as farmland, had been abandoned as such. Without notifying landowner-plaintiff, defendant constructed a road to serve the unit well over plaintiff's property. Plaintiff alleged that defendant, by this act, committed a trespass. The court ruled that plaintiff bought the land subject to the outstanding mineral interest, and that the conduct complained of was necessary in the exercise of that interest. Although not specifically stating a reason, the court found that defendant exercised its right in an unnecessary manner. In arriving at this conclusion, no reference was made to the Civil Code. Instead, the court cited as authority *Patout v. Lewis*,<sup>53</sup> a case involving a conventional servitude unrelated to mineral rights transactions. The court thus failed to announce a standard under which future cases may be decided. Nevertheless, in relying upon *Lewis*, the court may have indicated its willingness to consider the applicability of the Civil Code and related jurisprudence to the solution of the problem.

Several articles of the Civil Code could be applicable to the rights and obligations of the landowner and the mineral servitude owner regarding use of the surface. Article 771 provides that in establishing a servitude, all that is necessary to exercise it is also created at the same time; these accessory rights, however, must be exercised in the manner least inconvenient to the servient estate.<sup>54</sup> Article 772 allows the owner of the dominant estate to make all works needed for the use and maintenance of the servitude.<sup>55</sup> The owner of the dominant estate may, under article 774, enter the servient estate in order to construct or repair the necessary works and may also deposit materials and rubbish thereon.<sup>56</sup> If the act creating the servitude

---

53. 51 La. Ann. 210, 25 So. 134 (1899).

54. An accessory of passage, for example, must, according to Civil Code article 771, be exercised in the manner least inconvenient to the servient estate. Where a servitude exists entitling the owner of the dominant estate to a one-half interest in an artesian well, the laying of a pipe to the well is considered necessary for the use of the servitude, and the owner of the servient estate may not tamper with it. *Givens v. Chandler*, 143 So. 79 (La. App. 1st Cir. 1932).

55. If, as part of his right of servitude, the owner of the dominant estate is allowed to use part of the servient estate as a dumping ground for sugar cane, he is entitled to construct a fence to keep cattle out. *Patout v. Lewis*, 51 La. Ann. 210, 25 So. 134 (1899).

56. In the exercise of a servitude granting a right of way for telephone lines, the servitude owner may cut trees within six feet of the line without facing liability. *Sticker v. Southern Bell Tel. & Tel. Co.*, 101 So.2d 476 (La. App. 1st Cir. 1958). Where trees have been cut along a right-of-way, however,

states otherwise, the agreement must control.<sup>57</sup> Article 777 prohibits the servient estate owner from diminishing the use of the servient estate or making it more inconvenient. He may not change the condition of the premises, nor may he transfer the place where the servitude is exercised.<sup>58</sup> But if the original location becomes more burdensome to the servient estate, the owner may offer the owner of the dominant estate a place equally convenient for its exercise, and he must accept it.<sup>59</sup> Article 778 requires the servitude owner to use it only according to his title. He must make no alteration in either estate which would make the condition of the servient estate worse.<sup>60</sup>

If the manner in which the servitude is to be exercised is uncertain, the owner of the servient estate must, according to Article 779, fix the place where he wishes it exercised. In a servitude of passage, if the place where it is to be exercised is uncertain, it is the duty of the servient estate owner to fix the location. If he allows the *servitude owner* to establish it in a particular place and voices no protest, he is deemed to have acquiesced in the selection of the locale.<sup>61</sup> Also, the owner of the servient estate who remains silent while his *lessee* selects

---

the servitude owner may not simply pile them onto land not subject to the servitude. *Kerr v. Central La. Elec. Co.*, 59 So.2d 209 (La. App. 2d Cir. 1952). In constructing works on the servient estate, the servitude owner may tear down a levee and create other temporary damage, but must restore the land to its original condition once finished. *Duet v. Louisiana Power & Light Co.*, 169 F. Supp. 184 (E.D. La. 1958). It has been held that a servitude owner need not have the consent of the owner of the servient estate before going onto the land. *Miller v. Prairie Canal Co.*, 229 So.2d 752 (La. App. 3d Cir. 1969). *But see Grayson v. Lyons, Prentiss & McCord*, 226 La. 462, 76 So.2d 531 (1954).

57. La. Civ. Code art. 709: "The use and extent of servitudes thus established are regulated by the title by which they are granted . . ."

58. The servient estate owner may not construct a fence across an area set aside for a servitude of passage, *Patout v. Lewis*, 51 La. Ann. 210, 25 So. 134 (1899), nor may he perform excavation upon such an area, *Bruning v. New Orleans Canal & Banking Co.*, 12 La. Ann. 541 (1857). *See also Schaffer v. State Nat'l Bank*, 37 La. Ann. 242 (1855); *Waters v. Backus*, 8 Mart.(O.S.) 1 (1820); *Kaffie v. Pioneer Bank & Trust Co.*, 184 So.2d 595 (La. App. 2d Cir. 1966); *Nelson v. Warren*, 157 So.2d 762 (La. App. 2d Cir. 1963); *Arkansas-La. Gas Co. v. Cutrer*, 30 So.2d 864 (La. App. 2d Cir. 1947).

59. If a servitude of passage is being exercised, in the opinion of the servient estate owner, too close to his residence, he has a right to change its location, provided the change is to be a place suitably convenient. *Ronaldson v. Vicknair*, 185 So. 52 (La. App. 1st Cir. 1938). *Contra, Arkansas-La. Gas Co. v. Cutrer*, 30 So.2d 864 (La. App. 2d Cir. 1947).

60. *See, e.g., Shaffer v. State Nat'l Bank*, 37 La. Ann. 242 (1855); *Dickson v. Arkansas-La. Gas Co.*, 193 So. 246 (La. App. 2d Cir. 1939).

61. *Patout v. Lewis*, 51 La. Ann. 210, 25 So. 134 (1899).

a location for the exercise of the servitude will be bound thereby.<sup>62</sup>

Other provisions of the Civil Code on servitudes may prove helpful in an analysis of the problem. If the servitude owner is prevented from using his servitude because of an obstacle which he can neither prevent nor remove, prescription *liberandi causa* does not run so long as the obstacle remains.<sup>63</sup> There may be a tacit release of the servitude, as where the owner of the dominant estate allows the owner of servient estate to build works which would necessarily mean the discontinuance of the servitude.<sup>64</sup> But consent for the construction of these works must be expressly given, verbally or in writing, and the works constructed must be of solid and permanent nature.<sup>65</sup> Although requisite consent has been given by the participation in the use of the obstruction,<sup>66</sup> in most instances the courts have required either verbal or written consent in order to find extinguishment by tacit release.<sup>67</sup> As a general matter of contractual interpretation, article 753 requires that the manner and extent of servitudes are always to be interpreted in favor of the owner of the servient estate. The courts have generally exercised adherence to this provision.<sup>68</sup>

The Louisiana courts have relied heavily upon the above provisions of the Civil Code in resolving disputes involving the manner of exercising predial servitudes. The redactors of the

---

62. *Ronaldson v. Vicknair*, 185 So. 52 (La. App. 1st Cir. 1938). The court based this conclusion on Civil Code article 760, which allows he who assumes the quality of owner or he who acts in the name of the owner to acquire servitudes.

63. La. Civ. Code art. 792.

64. *Id.* art. 819.

65. *Id.* art. 820.

66. *Theriot v. Consolidated Co.*, 160 La. 459, 107 So. 305 (1926). *Richaud*, plaintiff's vendor, had sold land to defendant, reserving a right of passage along a ten foot strip. Before he sold the dominant estate to plaintiff, he allowed defendant to construct a garage on the rear part of the strip. *Richaud* used the garage, and was thus deemed to have consented to the obstruction, and the servitude was considered extinguished.

67. *Taylor v. Boulware*, 35 La. Ann. 469 (1883); *Delahoussaye v. Judice*, 13 La. Ann. 587 (1858); *Lavillebeuvre v. Cosgrove*, 13 La. Ann. 323 (1858); *James v. Buchert*, 144 So.2d 435 (La. App. 4th Cir. 1962).

68. "Contracts whereby servitudes are created, are designed to confer rights and impose obligations, which, otherwise would have no existence and should be strictly construed." *Dickson v. Arkansas-La. Gas Co.*, 193 So. 246, 249 (La. App. 2d Cir. 1939), quoting from *Shaffer v. State Nat'l Bank*, 37 La. Ann. 242 (1885). See also *Clause v. Broussard*, 146 So.2d 828 (La. App. 3d Cir. 1962), writs refused, 243 La. 1004, 149 So.2d 763 (1963).



Civil Code could not, however, have envisioned the existence of the mineral servitude in the form it has assumed today. It is for this reason that a new standard has been suggested, a subjective one which would emphasize the compatability of surface use rights and the need to conduct surface activities in a reasonable and proper manner. It has been suggested that "[t]he owner of land burdened by a mineral right and the owner of a mineral right . . . have correlative rights and duties regarding the exercise of their respective rights. Thus, each must exercise his rights with reasonable regard for the rights of the other."<sup>69</sup> This standard makes no suggestion that liability must always be based on a finding of negligence. It is conceivable that some activities, however carefully performed, could be actionable under this standard, such as the conduct of hazardous activity unduly threatening the other party's concurrent use right.<sup>70</sup> The primary emphasis, however, is on compelling the mineral servitude owner and the landowner to conduct their activities in a compatible manner.

This standard, if properly utilized, could prove to be of great value. As the amount of available land progressively diminishes, it should become a matter of public policy to emphasize the need for multiple uses of available land. No tract of land should be destined for the performance of only one function solely because of the inconvenience of multiple use when the land is properly suited for such use. Until such a standard is adopted, however, the Civil Code remains the most likely basis of authority for resolution of disputes of this nature. These articles provide considerable latitude for courts to reach equitable results in each fact situation. When read together, the articles can fairly be said to envision a relationship between dominant and servient estate owner wherein the owner of the servient estate is obligated to surrender that portion of surface area reasonably necessary for performance. At the same time, the dominant estate owner must conduct his activities mindful of his duty to minimize inconvenience to the servient estate. It must be said, however, that these articles, if applied strictly,

---

69. LA. STATE LAW INST., SUGGESTED PRINCIPLES OF LOUISIANA MINERAL LAW—A BASIS FOR REFORM, Recommendation No. 67 (b) (1971).

70. *Id.*

could lead to some undesirable results.<sup>71</sup> Therefore, the special character of the industry should be considered before resorting to any unduly strict interpretation of them.

Robert J. Prejeant

#### THE "\$30 OR 30 DAYS" FINE AS APPLIED TO INDIGENTS

The practice of imprisoning convicted defendants for failure to pay fines was firmly imbedded in the common law<sup>1</sup> and is established by statute in most states.<sup>2</sup> Imprisonment for non-payment of a fine was seldom questioned in federal courts, and, until the 1960's, none of the challenges to this procedure appears to have been founded upon a defendant's indigency.<sup>3</sup> Even as late as 1968, a federal district court upheld on constitutional grounds the practice of imprisonment of indigents under the alternative sentence of fine or imprisonment.<sup>4</sup> Consequently, the Fifth Circuit's recent pronouncement that the alternative sen-

---

71. For example, if article 779 were strictly applied, it would mean the landowner could select the location upon which the mineral servitude should be exercised, because the manner of exercising the servitude would be uncertain. The mineral servitude owner or those who derive their rights therefrom will always be in a better position to know the best place to locate a well, not the landowner.

1. E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 311 (8th ed. 1970): "But it was in the reign of Edward I in the latter half of the thirteenth century that incarceration came into extensive use in England, though even in this period it was used primarily as a 'squeezer,' or means of securing fines." See also 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 43-50 (3d ed. 1927); 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 57 (1883); STURGE, *STEPHEN'S DIGEST OF THE CRIMINAL LAW* 32-33 (9th ed. 1950).

2. See, e.g., ALASKA STAT. §§ 12.55.010, .030 (1962); COLO. REV. STAT. ANN. §§ 39-10-10 (1963); HAWAII REV. STAT. §§ 712-14 (1968); IND. ANN. STAT. § 9-2227a (Supp. 1972); NEV. REV. STAT. § 176.065 (1967); VT. STAT. ANN. tit. 13, §§ 7221-23 (Supp. 1972).

3. *In re Antazo*, 3 Cal. 3d 100, 113 n.10, 473 P.2d 999, 1007 n.10, 89 Cal. Rptr. 255, 263 n.10 (1970): "Prior to 1960 none of the cases appear to have involved challenges based upon a defendant's indigency. [Citations omitted.] The question whether the imprisonment of indigent convicted defendants for non-payment of fines offended the equal protection clause under the principle declared in *Griffin* was raised in *Wildeblood v. United States*, *supra*, 109 U.S. App. D.C. 163, 284 F.2d 592 (dissent by Edgerton, J.). During the last ten years numerous cases dealt with the question." [Citations omitted.]

See generally Annot., 31 A.L.R.3d 926 (1970), and 16 Am. Jur. 2d *Constitutional Law* § 388 at 727-28 (1964).

4. *Kelly v. Schoonfield*, 285 F. Supp. 732, 736 (D. Mich. 1968): "It has been generally held that commitment under such circumstances is not an unconstitutional imprisonment for debt, and that it does not violate any other constitutional provision, although doubt has been expressed where it results in a total imprisonment longer than the maximum imprisonment which could have been imposed for the offense." (Emphasis added.)